

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554**

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| <b>In the Matter of</b>  | )   |
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| <b>Amendment of Parts 1, 21, 73, 74 and 101 of<br/>the Commission's Rules to Facilitate the<br/>Provision of Fixed and Mobile Broadband<br/>Access, Educational and Other Advanced<br/>Services in the 2150-2162 and 2500-2690<br/>MHz Bands</b> | ) <b>WT Docket No. 03-66<br/>RM-10586</b> |
|  | )   |
| <b>Part 1 of the Commission's Rules – Further<br/>Competitive Bidding Procedures</b>   | ) <b>WT Docket No. 03-67</b>              |
|  | )   |
| <b>Amendment of Parts 21 and 74 to Enable<br/>Multipoint Distribution Service and the<br/>Instructional Television Fixed Service<br/>To Engage in Fixed Two-Way<br/>Transmissions</b>  | ) <b>MM Docket No. 97-217</b>             |
|  | )   |
| <b>Amendment to Parts 21 and 74 of the<br/>Commission's Rules With Regard to<br/>Licensing in the Multipoint Distribution<br/>Service and in the Instructional Television<br/>Fixed Service for the Gulf of Mexico</b>                           | ) <b>WT Docket No. 02-68<br/>RM-9718</b>  |
|  | )   |
| <b>Promoting Efficient Use of Spectrum Through<br/>Elimination of Barriers to the Development of<br/>Secondary Markets</b>   | ) <b>WT Docket No. 00-230</b>             |
|  | )   |

**To: The Commission**

**COMMENTS**

The law firm of Blooston, Mordkofsky, Dickens, Duffy & Prendergast ("BloostonLaw"), on behalf of its clients in the Broadband Radio Service listed on Attachment A hereto and pursuant to Sections 1.415 and 1.421 of the Commission's Rules, hereby submits its Comments in response to the Commission's Report and Order

and Further Notice of Proposed Rulemaking, FCC 04-135, released July 29, 2004

(“FNPRM”).<sup>1</sup> In support hereof, the following is shown:

**Statement of Interest**

1. BloostonLaw’s clients are licensees in the Broadband Radio Service serving predominantly rural areas in the United States. Accordingly, BloostonLaw’s clients have an interest in any changes to the licensing and service rules adopted by the Commission.

**MEAs Where No Transition Plan Has Been Filed**

2. In the Report and Order portion of the item containing the FNPRM, the Commission adopted a five-phase transition process to be implemented on the basis of Major Economic Areas (“MEAs”) during the three-year period commencing on January 10, 2005 and ending on January 10, 2008. The transition planning process in a given MEA is conducted under the auspices of one or more private parties who voluntarily step forward to become the transition proponent. FNPRM, Para. Nos. 72-92.

3. In the FNPRM, the Commission seeks comment on a proposed process for transitioning to the new band plan those MEAs where no proponent timely files an Initiation Plan. FNPRM, Para. Nos. 269, 289 - 295. Specifically, the Commission proposes: a) to make all Broadband Radio Service (“BRS”) and Educational Broadband Service (“EBS”) spectrum in such MEAs available by clearing existing spectrum assignments; b) to issue incumbent EBS and BRS licensees modified licenses to continue current operations until new licensees give notice of intent to offer incompatible new services; and c) to grant incumbent licensees transferable bidding offset credits to

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<sup>1</sup> The FNPRM was published in the Federal Register on December 10, 2004. Accordingly, these Comments are timely filed. See FNPRM, Para. No. 376.

preserve their ability to access spectrum of “comparable value” in the ensuing auctions. Following the auction, the Commission would then grant new licenses in the affected MEAs pursuant to the new band plan. FNPRM, Para. Nos. 269, 289 – 312. Notably, the Commission foresees that MEA transition plan proponents “will largely consist of larger businesses with sufficient revenue to transition the entire [MEA].” FNPRM, Para. No. 384. Thus, the MEAs where no transition plans are filed would be those in which the larger companies have no interest, and could be reasonably expected to include MEAs without large metropolitan areas, but with a great deal of rural area.

4. As can be plainly seen, the Commission’s proposal would simply strip BRS and EBS incumbents of their existing licenses, and require their immediate participation in an auction to preserve the very licenses they already possess (albeit under the new band plan). Through no fault of their own, these licensees are being placed immediately at a severe and patently unfair disadvantage simply because they operate in an MEA viewed as economically undesirable by the large companies having the resources to transition the entire MEA. As the Commission has previously acknowledged, small companies simply do not possess the financial resources to discharge the myriad of duties imposed upon transition plan proponents. FNPRM, Para. No. 384.

5. Accordingly, in MEAs where no proponent timely files an initiation plan, incumbent licensees should be accorded a period of one-year (measured from the January 10, 2008 end of the transition period) within which to file applications for authority to modify their individual licenses to operate under the new band plan. As a practical matter, incumbent licensees in the MEA can be expected to frequency coordinate their technical proposals prior to filing so that mutually exclusive applications will not exist.

Under this proposal, licensees (both BRS and EBS) would bear their own transition costs. This proposal is clearly workable, and is considerably fairer to incumbent licensees than the Commission's proposal. While small companies (including those serving rural areas) have access to the technical expertise needed to modify their own facilities, they lack the financial resources necessary to serve as transition plan proponents.

6. EBS licensees will not be prejudiced by this proposal. While transition plan proponents are required to pay the costs associated with the transition for EBS licensees transitioned pursuant to an initiation plan, they otherwise bear their own costs under the rules promulgated in the Report and Order portion of the item containing the FNPRM.

**Licenses Should Be Auctioned Based Upon BTAs or PSAs/GSAs**

7. As a general matter, the Commission has proposed to grant, by auction, new licenses for spectrum in the 2500 – 2690 MHz band. The Commission has proposed that the auction be open to all parties (both incumbents and new entrants) eligible to hold the licenses. The Commission has proposed to use MEAs as the basis for new licensing in the Lower Band Segment ("LBS") and Upper Band Segment ("UBS") of the new band plan, and to use Economic Areas ("EAs") as the basis for new licensing in the Middle Band Segment ("MBS"). FNPRM, Para. No. 274. With respect to license areas for relinquished spectrum, the Commission seeks comment on whether the market area for auction should be defined as the geographic area of the relinquished license, *i.e.*, as the Partitioned Service Area ("PSA")/Geographic Service Area ("GSA") or the Basic Trading Area ("BTA"), as the case may be. FNPRM, Para. No. 278.

8. Relinquished spectrum will come from those incumbent licensees who elected not to participate in the transition plan for their MEA. The Commission proposes to

provide such non-participating licensees with an offset bidding credit for use in the auction in conjunction with a non-renewable temporary license which will have secondary status with respect to the license awarded the auction winner. FNPRM, Para Nos. 296 – 300, 305 - 306. Two types of bidding credits are envisioned: a) a credit calculated based on MHzPops for use in auctions for the incumbent's original license; and b) a credit calculated as a face dollar amount that the incumbent can use to obtain licenses in new areas or bands different from those authorized by the original license. FNPRM, Para. Nos. 305 and 306.

9. It is important to bear in mind that all incumbent licensees (including those relinquishing spectrum) currently have ongoing businesses – businesses that they would like very much to preserve. The Commission's objective in this proceeding should be to implement the new band plan, not to drive incumbents out of business. It is against this backdrop that BloostonLaw requests the Commission to define the market area for relinquished spectrum as the original licensee's service area (whether BTA or PSA/GSA) for purposes of auction so that existing businesses will be preserved. This will assure that the bidding offset credit granted a relinquishing incumbent has maximum value in the auction. To auction relinquished spectrum based upon an EA or MEA-based market definition would render the bidding offset credit essentially worthless. This is because EAs and MEAs are considerably larger than the PSA/GSA or BTA market definition upon which the current licenses are based, and the bidding offset credit would most likely cover only a small fraction of the net winning bid for such a large geographic area so as to make the bidding offset credit superfluous.

**Opt-Outs Should Receive 12 to 18 (Not 6) MHz of MBS Spectrum**

10. In the FNPRM, the Commission recognized that existing licensees that only want to continue current high-power operations solely in their limited PSA/GSA may not find new licenses suitable for such uses. Accordingly, the Commission proposes offering such licensees an opportunity to retain their current GSA instead of receiving a bidding offset credit to obtain a new license. Insofar as relevant here, under the Commission's proposal, an opt-out licensee would receive only one new 6 MHz primary license (high-power) for operations in its current GSA on frequencies selected by the Commission at the core of the MBS. The new license would have the same geographic area as the modified license, would have primary status, and would be eligible for renewal. Additionally, such opt-out incumbents would have others pay for their relocation.

FNPRM, Para. Nos. 313 – 319.

11. BloostonLaw applauds the Commission's proposal to grant opt-out incumbents at least 6 MHz of licensed spectrum for high-powered operation, a license that would have primary status and would be eligible for renewal. However, BloostonLaw is concerned that only 6 MHz of spectrum may not be adequate to preserve existing businesses, since many BRS and EBS licensees currently operate systems with 24 MHz of spectrum for high-power operations. BloostonLaw urges the Commission to grant opt-out incumbents 12 to 18 MHz of spectrum for high-power operations, under a license which is primary and renewable, so that these existing licensees will be in a position to preserve their existing businesses. The requested 12 to 18 MHz of spectrum would provide plenty of incentive for most licensees to avoid "opt-out" in favor of participating in MEA transition plans, where they would receive 23.5 MHz of spectrum.

Providing this option to incumbent licensees meets the Commission's goal of a smooth transition, while providing incumbent licensees with meaningful alternatives to protect their businesses. Accordingly, the grant of 12 to 18 MHz of spectrum to opt-out incumbents is consistent with the public interest.

**Wireless Cable Exception to EBS Eligibility Restrictions**

12. On October 25, 1991, the Commission adopted regulations (in the form of Section 74.990 of the Rules) to permit the licensing of available Instructional Television Fixed Service (now EBS) channels by otherwise ineligible wireless cable entities, provided certain conditions were satisfied. In the FNPRM, the Commission stated that the wireless cable exception should not apply to EBS in the post-transition environment. FNPRM, Para. No. 349. Nevertheless, the Commission sought further comment on whether to retain the wireless cable exception at this time for markets that have not been transitioned. However, the Commission also emphatically stated that, regardless of its ultimate decision on this issue, it will grandfather existing licenses granted pursuant to the wireless cable exception, and that such licenses may continue to be renewed and assigned. FNPRM, Para. No. 350.


13. BloostonLaw applauds the Commission's decision to grandfather existing licenses granted under the wireless cable exception with full renewal and assignment rights. However, BloostonLaw requests the Commission to clarify that both transfers of control and modifications to these licenses also will be allowed in order to permit full grandfathering to be implemented.

**WHEREFORE**, BloostonLaw requests the Commission to adopt the proposals set forth herein.

Respectfully submitted,

**Blooston, Mordkofsky,  
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Dated: January 10, 2005

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## **ATTACHMENT A**

- 1) Consolidated Telecom
- 2) The Hinton CATV Company, Inc.
- 3) North Dakota Network Co.
- 4) James D. and Lawrence D. Garvey d/b/a Radiofone
- 5) West River Cooperative Telephone Co. and G.W.  
Wireless, Incorporated Partnership